IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 133 of 2005

For Approval and Signature:
HON'BLE MISS JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GUNVANTBHAI SANABHAI BAROT - Appellant(s)

Versus

PIRUBHAI RAHIMBHAI MALAIWALA & 1 - Defendant(s)

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Appearance :
MR AR MAJMUDAR for Petitioner
MR PUSHPAVADAN VYAS for Mr. BS PATEL for
MRS RANJAN B PATEL for Respondents
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CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT
Date : 18/07/2005

ORAL JUDGMENT

Learned advocate Mr. Majmudar has, at the outset, submitted that the present Revision Application preferred under Section 29 (2) of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 {hereinafter referred to as,

"**the Rent Act**'} is not maintainable. He has submitted that the respondents-plaintiffs had instituted Regular Civil Suit No. 486 of 1980 for recovery of possession of the suit premises in the Court of learned Civil Judge [JD], Dabhoi, in its ordinary civil *jurisdiction*. Against the judgment of the learned Civil Judge, Dabhoi, the plaintiffs had preferred Regular Civil Appeal under Section 96 (1) CPC in the Court of learned District Judge, Vadodara. The *impugned* judgment in appeal under Section 96 (1) CPC is assailable before this Court in Second Appeal under Section 100 CPC and not in Revision Application under Section 29 (2) of the Rent Act.

In above view of the matter, the Revision Application is converted into Second Appeal be registered as such. The petitioner-appellant shall pay the requisite Court fee within one week from today.

Feeling aggrieved by the judgment and order dated 30th June, 1995 passed by the learned *Extra* Assistant Judge, Vadodara in Regular civil Appeal No. 247 of 1984, the respondent-defendant has preferred the present Second Appeal.

The respondents-plaintiffs are the owners of the suit premises bearing Municipal Census No. 2/12/51, situated at Dabhoi. The suit premises was leased to one Chhaganlal

Damodardas Barot. The said tenant-Chhaganlal Barot passed away on 18th May, 1979, leaving no family of his own. The said Chhaganlal Barot had made a Will during his lifetime. Under the said Will, the suit premises and the business of hotel carried on in the suit premises alongwith furniture, fixtures and other paraphernalia was bequeathed to the defendant. The defendant thus came into the possession of the suit premises.

The plaintiffs instituted Regular Civil Suit No. 486 of 1980 for recovery of possession of the suit premises. According to the plaintiffs, the tenant-Chhaganlal Barot had died leaving no family and that at the time of his death no member of his family was carrying on business with him. The defendant was, therefore, a trespasser in the suit premises. The suit was contested by the defendant vide written statement Exh.13. He denied that he was a trespasser in the suit premises. According to him, the business carried on by the deceased-tenant was a joint family business and the defendant, being one of the parceners, had a right to continue the business after the death of the tenant. It was also claimed that the deceased tenant had bequeathed the tenancy right in the suit premises to the defendant.

The learned Civil Judge, by judgment and order dated 30th April, 1984, held that the defendant was not a

trespasser in the suit premises. The learned Civil Judge also held that the defendant was a legal tenant in the suit premises. The suit was accordingly dismissed. Feeling aggrieved, the plaintiffs preferred Regular Civil Appeal No. 247 of 1984 under Section 96 (1) CPC in the Court of learned District Judge, Vadodara. The learned Assistant Judge, by *impugned* judgment and order dated 30th June, 1995, held that the defendant was not a legal tenant within the meaning of the Rent Act and that he was a trespasser in the suit premises. The Appeal was accordingly allowed and the decree for eviction has been passed against the defendant. Feeling aggrieved, the defendant has approached this Court.

The substantial question of law that arises in this Appeal is whether the defendant can be said to be a trespasser in the suit premises.

Mr. Majmudar has submitted that the learned Civil Judge having held the defendant to be a '*tenant*' within the meaning of the Rent Act, the Civil Court had no *jurisdiction* to entertain the Appeal under Section 96 (1) CPC, and that the Appeal should lie under Section 29 (1) of the Rent Act. Mr. Vyas has submitted that the defendant had claimed right to possession of the suit premises under the Will of the deceased tenant [*Exh. 65*]. He has

submitted that the said Will Exh. 65 did not bequeath the tenancy right of the deceased tenant in the suit premises to the defendant. What was bequeathed under the said Will was the furniture, fixtures and paraphernalia of the hotel business carried on by the deceased tenant in the suit premises and not the tenancy right in the suit premises. Thus, the defendant had no right to occupy the suit premises under the Will. *Admittedly*, he was not carrying on the business with the deceased tenant nor was he a family of the deceased tenant. The defendant was rightly held to be a trespasser in the suit premises.

The word, "**Trespass**" as defined in Halsbury's *Laws of England* [3rd Edition, Vol.38], means, "**Trespass is a wrongful act done in disturbance of the possession of property of another, or against the person of another, against his will. To constitute a trespass the act must in general be unlawful at the time when it was committed**."

I am of the view that the lower appellate Court has manifestly erred in holding that under the Will [*Exh.65*], the deceased tenant did not bequeath the tenancy right in the suit premises to the defendant and that the defendant was a trespasser in the suit premises. On conjoint reading of paragraphs 3 & 4 of the said Will, it is more than

clear that the testator had bequeathed his business carried on in the suit premises along with all rights therein to the defendant. That should necessarily include the tenancy right of the deceased tenant. *Hence*, in my view, the deceased tenant did bequeath the tenancy right in the suit premises to the defendant no.3. Whether the deceased tenant had such a right or not or whether the defendant was entitled to inherit tenancy through such Will or not is a question which need not be answered in the present proceeding. *Evidently*, the defendant did enter the suit premises pursuant to the bequeath made to him under the aforesaid Will [*Exh.65*]. In my view, therefore, the action of the defendant in entering the suit premises cannot be said to be wholly illegal nor the defendant can be said to be a trespasser in the suit premises. I also do not agree with the view expressed by the learned Civil Judge that the defendant was a legal tenant in the suit premises. Once the defendant was held to be not a trespasser, the *jurisdiction* of the learned Civil Judge came to an end. Whether or not the defendant was a tenant within the meaning of the Rent Act was a question required to be left to the Rent Court. In my opinion, both the Courts below have exceeded their *jurisdiction* – first, in holding that the defendant was a legal tenant and the lower appellate Court in holding that the defendant was not a tenant within the meaning of

Section 5 [11](c)(ii) of the Rent Act.

As I have held that the defendant is not a trespasser in the suit premises the suit shall necessarily fail.

In view of the above discussion, the Appeal stands allowed. The *impugned* judgment and order dated 30th June, 1995 passed by the learned *Extra* Assistant Judge, Vadodara in Regular Civil Appeal No. 247 of 1984 is *quashed* and set aside. The judgment and order dated 30th April, 1984 passed by the learned Civil Judge [JD], Dabhoi in Regular Civil Suit No. 486 of 1980 is *quashed* and set-aside in so far as the defendant had been held to be a legal tenant in the suit premises. The question whether the defendant is a tenant in the suit premises within the meaning of Section 5 [11](c) of the Rent Act is left open to be decided by the Rent Court. The Regular Civil Suit No. 486 of 1980 for possession stands dismissed. The parties shall bear their own cost.

{Miss R.M Doshit, J.}

*Prakash**